APPROVED
NO REDACTION NEEDED

THE COURT OF APPEAL

CIVIL

Appeal Number: 2021/286

Haughton J. **Neutral Citation Number [2023] IECA 230**

Binchy J.

Allen J.

BETWEEN

SAMUEL VAN EEDEN

PLAINTIFF/APPELLANT

AND

THE MEDICAL COUNCIL,

IRELAND AND THE ATTORNEY GENERAL

DEFENDANTS/RESPONDENTS

JUDGMENT of Mr. Justice Allen delivered on the 6th day of October, 2023.

Introduction

1. This is an appeal by Dr. Samuel Van Eeden, who is a registered medical practitioner, against the judgment of the High Court (Twomey J.) delivered on 24th September, 2021 ([2021] IEHC 606) and consequent order made on 13th October, 2021 dismissing his action against the Medical Council, Ireland and the Attorney General.

2. Contrary to the vehement insistence of the late Mr. Alan Toal B.L. that it was not, the object of the action was plainly to restrain an inquiry by a Fitness to Practice Committee of the Medical Council into various allegations of professional misconduct on the part of Dr. Van Eeden, including the importation into the State of an unauthorised medicine and the prescription of unauthorised medicines to his patients.

3. The proceedings were, in form, an action commenced by the issue of a plenary summons seeking a variety of declarations and damages, rather than an application for leave to apply by way of judicial review to prohibit the inquiry: but Dr. Van Eeden's core argument – in which he has been consistent from the outset – is that there ought not to be, and ought never to have been, an inquiry by the Fitness to Practice Committee into the allegations which have been made against him: and he wants it stopped.

4. The foundation – or at least the premise – of Dr. Van Eeden's case was that the Medical Council was not entitled to – or at least ought not to – inquire into matters for which he had previously been tried and acquitted by the District Court. As I will come to – and as the High Court judge found – it is perfectly clear from a comparison of the criminal charges and the allegations set out in the notice of inquiry that the allegations of professional misconduct are not based on the alleged offences of which Dr. Van Eeden was acquitted. That being so, the action and the appeal were both built on sand.

5. The events the subject of the proceedings date back to 2012 and the Medical Council's interest to 2014 but the inquiry has been beset by delays.

The facts

6. On 12th June, 2012 a piece of luggage owned by Dr. Van Eeden's wife, which had come from Bangladesh and which, by all accounts, had temporarily gone astray, was searched by Customs officers at Dublin Airport and was found to contain a number of unauthorised prescription only medicinal products.

7. The discovery prompted an investigation by the Health Products Regulatory Authority *("HPRA")* (which was at that time known as the Irish Medicines Board) in the course of which a number of witness statements were taken, including a statement under caution from Dr. Van Eeden.

8. On 3rd April, 2014 Dr. Van Eeden was summoned to appear before the Dublin Metropolitan District Court, to answer sixteen charges that he had, on or about 12th June, 2012, procured and imported into the State eight identified prescription only medicinal products otherwise than in accordance with a marketing authorisation, contrary to regulation 6(2) of the Medicinal Products (Control of Placing on the Market) Regulations, 2007 (S.I. No. 540 of 2007), and without a manufacturer's authorisation, contrary to regulation 4(c) of the Medicinal Products (Control of Manufacture) Regulations, 2007 (S.I. No. 539 of 2007).

9. On 22nd October, 2014 he was acquitted on all charges.

10. In the meantime, a newspaper report of the prosecution published on 8th July, 2014 had come to the attention of the Medical Council and at its meeting on 10th July, 2014 the Council referred the matter to its Preliminary Proceedings Committee for consideration as to whether the matter warranted further action.

11. On 5th December, 2014 the HPRA submitted a report to the Medical Council entitled *"Importation of unauthorised prescription only medicinal products"*, attached to which were twenty-five statements, including the cautioned statement taken from Dr. Van Eeden.

12. On 6th October, 2015 the Preliminary Proceedings Committee decided that the matter did require further action and directed that a sworn inquiry should be held into whether Dr. Van Eeden had engaged in conduct constituting professional misconduct or poor professional performance.

13. On 22nd September, 2016 Dr. Van Eeden was given notice of an inquiry to be held by the Fitness to Practice Committee under Part 8 of the Medical Practitioners Act, 2007. The notice set out seven allegations and charged Dr. Van Eeden that arising from one or more of those allegations *"individually and/or cumulatively and/or in combination"*:-

(a) He had engaged in conduct which doctors of experience, competence and good repute consider disgraceful or dishonourable; and/or

(b) That his conduct amounted to a serious falling short of the standards of conduct expected among doctors; and/or

(c) That he had failed to meet the standards of competence (whether in knowledge and skill or the application of knowledge and skill or both) that could reasonably be expected of a medical practitioner practising medicine of the kind practiced by him.

14. Two of the seven particulars were later withdrawn, leaving five (or really four) which were, in summary:-

1. That in or around February, 2012 Dr. Van Eeden had imported into the State a quantity of Lidocaine without a manufacturer's authorisation, contrary to regulation 4(c) of the Medicinal Products (Control of Manufacture) Regulations, 2007 (S.I. No. 539 of 2007).

2. That at some time during or after February, 2012 he had administered a quantity of Lidocaine, imported from Dhaka, Bangladesh, without marketing authorisation, to one or more patients in his care;

3. That in or around June, 2012 it had been his intention to administer to one or more patients in his care six identified medicinal products which did not enjoy a marketing authorisation within the meaning of the Medicinal Products (Control of Manufacture) Regulations, 2007 (S.I. No. 539 of 2007).

4. That in his Annual Retention Application Form for Registered Medical Practitioners in 2014, submitted on or around 30th June, 2014, in answer to the question whether he had ever been convicted or any criminal offences in or outside the State, or was aware of any criminal investigations in process against him, he had, in circumstances in which he knew or ought to have known that the response was not true, answered *"No."*.

5. *"Such further allegations as may be notified to you in advance of the inquiry."*

15. A schedule to the notice of inquiry entitled *"Particulars of Evidence"* listed eleven witnesses, including eight persons who had given statements in the course of the Irish Medicines Board investigation who, it was said, would be asked by the Chief Executive Officer to give evidence to the inquiry and who, it was said, would give evidence in relation to matters referred to in statements dated between 12th June, 2012 and 5th December, 2012.

16. For all Dr. Van Eeden's protestations of *res judicata* and *autrefois acquit* the allegations the subject of the Fitness to Practice Committee inquiry are manifestly not the allegations on which the criminal charges against him were based.

17. In the first place, the medicinal product Lidocaine was not one of the eight prescription only medicinal products on which the criminal charges had been based.

Secondly, the alleged importation and administration of Lidocaine plainly predated the alleged procuring and importation of medicinal products on 12th June, 2012. Thirdly, the allegation in relation to the answer given in response to the question on Dr. Van Eeden's Annual Retention Application Form had nothing to do with the merits of the then pending prosecution. As to the allegation in relation to the intention to administer the six identified medicinal products, the six identified products were among the eight products which had been the subject of the criminal charges and there was obviously a coincidence in time. However, the complaint was not that Dr. Van Eeden had procured or imported them without the necessary authorisations – which had nothing to do with his being a doctor – but that as a registered medical practitioner, he had intended to administer unauthorised medicines to one or more patients.

The Fitness to Practice Inquiry

18. The Fitness to Practice Committee first convened on 30th September, 2016 when *inter alia* the notice of inquiry was amended. It was then adjourned from time to time until 31st March, 2017 *inter alia* to enable the determination by the Committee of a preliminary objection on behalf Dr. Van Eeden – upon which there was an exchange of written submissions – that the inquiry could not proceed on the basis that the allegations against him were *res judicata*.

19. There is a transcript of the hearing before the Fitness to Practice Committee on 31st March, 2017. The submission then made on behalf of Dr. Van Eeden is not altogether easy to follow but the bones of it was that the decision of the High Court (Ó Caoimh J.) in *A.A. v. The Medical Council* [2002] 3 I.R. 1 *("A.A. (No. 1))* – the gravamen of which is that the doctrine of *res judicata* does not apply to proceedings before the Medical Council – had somehow or other been overtaken by the decision of the Supreme Court in *Director of Public*

Prosecutions v. J.C. [2015] IESC 31. Without dwelling on the detail, the Committee – having heard counsel for the Chief Executive Officer and taken the advice of its legal assessor – was strongly of the view that there was nothing in *J.C.* which in any way modified the law as it had been stated in *A.A. (No. 1)* but agreed to adjourn the hearing to allow Dr. Van Eeden the opportunity to make an application to the High Court by way of judicial review. The stenographer appears to have picked up an intonation in the ruling of the Chairperson by recording in parentheses that *"The Committee accepts that the point raised by Mr. Toal is a 'novel' point."*

20. It is perhaps worth recording at this point that the Committee did not undertake a comparison of the allegations set out in the notice of inquiry and the criminal charges. It was urged by counsel for the Chief Executive Officer to do so and encouraged by the legal assessor to do so, but it was asserted by counsel for Dr. Van Eeden that somehow or other – I do not see how – he might be prejudiced in his proposed judicial review application if he engaged with an assessment as to whether, on the facts, the legal argument as to *res judicata* was engaged. Portentously, in an exchange with counsel for Dr. Van Eeden, the legal assessor suggested that one of the first questions the High Court was going to ask in relation to a judicial review was that he had not given the Committee an opportunity to make a decision that was reviewable.

21. Having heard counsel and the legal assessor, the Committee decided that while it was satisfied that it could proceed to hear the substantive *res judicata* application applying what it said was the current applicable law, it would allow Dr. Van Eeden the opportunity to make the proposed High Court application, provided he did so within a week.

The judicial review application

22. On 7th April, 2017 Dr. Van Eeden made an application *ex parte* to the High Court by way of judicial review for an order of *certiorari* of the decision of the Fitness to Practice Committee *"wherein they determined that they would not accept the authority of DPP v JC as having any bearing and/or applicability to the facts of the applicant's case which fell to be decided in relation to the doctrine of res judicata"* and for various declarations.

23. On the direction of the High Court, the leave application was heard on notice to the Fitness to Practice Committee and the Medical Council and, for the reasons given in a written judgment of Faherty J. delivered on 11th October, 2017 ([2017] IEHC 632), refused. As Faherty J. put it at para. 51:-

> *"… the finding of the Court is that counsel for the applicant did not succeed in getting past the starting block for leave to be granted because, firstly, no substantive decision at this moment in time has been made such as impacts on the applicant's interests, and, secondly, in respect of the decision that was made, the applicant has not identified the legal principle or principles to which, he alleges, the [Fitness to Practice Committee] failed to accede or pay regard."*

24. I pause here to emphasise that the finding by Faherty J. that no substantive decision had been made such as impacted on Dr. Van Eeden's interests was made in the context of his challenge to the conduct of the inquiry. There was no challenge at that stage to the establishment of the inquiry.

25. An appeal by Dr. Van Eeden was dismissed by the Court of Appeal extemporarily on 3rd February, 2020.

26. The inquiry by the Fitness to Practice Committee was scheduled to resume on 13th February, 2020 but was adjourned on the application of Dr. Van Eeden's lawyers. Two further dates in 2020 were abandoned by reason of COVID-19 restrictions and one by reason

of the indisposition of Mr. Toal. Eventually, a new date was fixed for the resumption of the inquiry on 23rd February, 2021.

The plenary action

27. These proceedings were commenced by plenary summons issued on 19th February, 2021 by which Dr. Van Eeden claimed a number of declarations, as well as damages and costs. The substance of the action was the claim, at para. 1 of the general indorsement of claim, for:-

> *"A declaration to the effect that Part 8 of the Medical Practitioners Act 2007 is, in the manner of its application to doctors against whom criminal complaints have been alleged, prosecuted but defeated, unfair capricious and fundamentally in breach of that doctors right, the plaintiff herein, to be treated equally under the Constitution and is, in such circumstances repugnant to the Constitution and should be struck down as unconstitutional for its failure to treat all citizens in like fashion in accordance with the provisions of Article 40.1."*

28. The recurring theme of most of the further declarations sought was that Dr. Van Eeden had been acquitted of the offences with which he had been charged and that the inquiry into his professional performance by reference to matters which had been disposed of in the District Court amounted to invidious discrimination.

29. There was a separate claim for – more or less, but not in those terms – a declaration that the powers of sanction conferred by the Medical Practitioners Act, 2007 on the Fitness to Practice Committee contravened Articles 34 and 37 of the Constitution on the ground that the exercise of those powers amounted to the administration of justice which was not limited in nature.

30. Being as charitable as I can, the orders sought were imprecise. It was suggested repeatedly that Dr. Van Eeden was being *"prosecuted"* and *"further prosecuted"* by and before the Medical Council for exactly the same charges of which he had already been acquitted. If it could loosely be said that Dr. Van Eeden is being *"prosecuted"* before the Fitness to Practice Committee, it is quite clear from a juxtaposition of the District Court summons and the notice of inquiry that the subject matter is not the same.

31. The summons also included a vague challenge to the entitlement of the Medical Council – inferentially, perhaps, by the Preliminary Proceedings Committee or the Fitness to Practice Committee, or both – to have relied on the information gathered by the HPRA and an oblique challenge to the correctness of the decision in *A.A. (No. 1)*. The general indorsement of claim (and the prayer to the statement of claim) refers twice to Article 40.1 of the Constitution and once to Article 37. There was no reference to Article 34 or 38.

32. The statement of claim introduced the Medical Council as:-

> *"... a body created by statute with delegations made to it under and in accordance with Article 37 of the Constitution to regulate and oversee, including, from time to time, matters of a disciplinary nature."*

33. The statement of claim commenced with an account of genesis and progress – such as it has been – of the inquiry and moved to a summary of the leave application and the attempts of the Fitness to Practice Committee to progress the inquiry after the application had been refused by the High Court. If not the thrust of the statement of claim, then all that I can discern from it, is that the Dr. Van Eeden claimed to have been invidiously discriminated against by reason of the commencement against him of the disciplinary inquiry.

34. At para. 2 of the statement of claim there is an assertion that, after Dr. Van Eeden was acquitted, the HPRA *"in unlawful consort [sic.]"* with the Medical Council *"wrongfully and*

unlawfully thereafter handed their investigation file" to the Medical Council *"who have, since that time sought to essentially re-try the plaintiff … for the self-same offences for which he was acquitted."* Other than the declaration sought in relation to the HPRA file – to which I will come – there is nothing else pleaded as to why it is said that the handing over of the file was wrongful or unlawful. Specifically, there is no complaint that the Medical Council did not conduct its own investigation or make its own assessment of the evidence.

35. The defences were robust. The Medical Council and the State both pleaded that the action was an abuse of process and offended against the rule in *Henderson v. Henderson* (1843) 3 Hare 100 on the grounds that some of the reliefs claimed had already been claimed and dismissed in the judicial review application and that the remaining claims – if they were to have been advanced at all – could and should have been advanced as part of the judicial review application. The defence delivered on behalf of the State pleaded – not without justification – that the statement of claim was *"variously and in parts prolix, embarrassing, scandalous and irrelevant to any cause of action purportedly disclosed."*

The amendment application

36. The action was case managed in the High Court chancery list with a view to an early trial. At a case management hearing on 9th June, 2021 the action was listed for hearing in the last week of Trinity term and directions were given for the exchange of written legal submissions.

37. At the callover on 22nd July, 2021 of the cases listed for hearing during the following week, there was a brief discussion as to whether the written submissions filed on behalf of Dr. Van Eeden had gone beyond the case pleaded: specifically by seeking to canvas an argument by reference to Article 38 of the Constitution. It was variously contended on behalf of Dr. Van Eeden that the Article 38 argument was open on the pleadings and that the

defendants would not be prejudiced by an amendment of the pleadings. With a view to – or at least in the hope of – focussing attention on this issue Dr. Van Eeden was given liberty to issue a motion to amend, returnable for the first day of the trial. The motion was issued on the following day, Friday 23rd July, 2021.

38. What was to have been the first day of the trial, 27th July, 2021, was given over entirely to the motion to amend, which was a motion for:-

> *"An order extending the plaintiff's existing grounds of relief sought to include a declaration to the effect that the practices engaged in by the first named defendant's Fitness to Practice Committee amounts to the unlawful and unconstitutional use, application and sanctioning by them, a statutory body, of Article 38 of the Constitution whereby they impermissibly hide behind the shield of a statutory scheme to make and/or purport to make findings of criminal conduct/guilt, outlawed by Article 38 in circumstances where the exercise of those rights are emphatically reserved to a court of law properly appointed under the Constitution."*

39. The motion was grounded on a short affidavit of Dr. Van Eeden's solicitor which suggested, variously, that the amendment was necessary so that the pleadings would reflect what was to be asserted at the trial of the action; that the defendants would not be prejudiced in the slightest; and that the motion was brought *"more as [a] matter of professional propriety and as a courtesy to the court where, whilst it might be argued by [] and on behalf of the plaintiff that the matter of Article 38 if referred to within the pleadings heretofore exchanged, whether explicitly and/or implicitly, it was considered prudent to ensure that the matter was clearly identified so that the defendants could not be labouring under any misconception in that regard."* The defendants, it was said, had had the plaintiff's written submissions since 8th July, 2021, to which they had, it was said *"responded accordingly."*

40. In moving the amendment application, Mr. Toal read into the record the reliefs claimed by the plenary summons – which he referred to as the original grounds – and opened extensive passages from the judgment of Simons J. in *Stafford v. Rice (Amendment of pleadings)* [2021] IEHC 235 before submitting that the application *"to amend or to add the additional reference to Article 38"* did not in any way radically alter the case as already pleaded.

41. The application was opposed by Ms. Barrington S.C., on behalf of the Medical Council, for a number of reasons but in large part, she said, because it was not really clear what the application to amend was intended to do. The action, she argued, was in truth an administrative challenge to the actions of the Fitness to Practice Committee and not really a constitutional challenge at all. Counsel emphasised that what was proposed was a further – and new – challenge to the practices of the Fitness to Practice Committee and not the Act of 2007. Far from providing clarity, she urged, the amendment, if permitted, would introduce confusion.

42. The application was similarly opposed by Mr. Holland S.C., for the State, who said that he was entitled to know but did not know what case he had to meet. There was, he said, from the State's point of view, a vital distinction between a challenge to the validity of the legislation and a challenge to the manner of its operation by the Medical Council. While acknowledging that he did not quite understand the proposed new claim, he suggested that it seemed to relate to practices of the Medical Council rather than the statute.

43. On 28th July, 2021 Twomey J. gave an *ex tempore* judgment on the amendment application. He said first, that it was clear that Dr. Van Eeden had been legally advised and in possession of all the facts since 2016 and that there had been no reason or excuse offered as to why the application to amend had not been brought sooner. The claim that the practices

of the Medical Counsel or the notice of inquiry contravened Article 38 was, he said, one which might have been but was not made as part of the unsuccessful judicial review application in 2017. Secondly, said the judge, the motion had taken up the time of the court for a whole of one of four days which had been set aside for the trial of the action. Thirdly, he said, Dr. Van Eeden appeared to be seeking to introduce a substantive new claim regarding inquiries by disciplinary bodies in relation to matters which overlap with criminal law. If what was proposed was a substantive new claim, the defendants would be prejudiced by having to meet it. On the other hand, if, as had been suggested by Dr. Van Eeden's solicitor, the proposed amendment did not seek to introduce anything substantially new, then it followed that the plaintiff would suffer little or no prejudice if it was refused. Fifthly, said the judge, the proceedings were in substance judicial review proceedings, the object of which was to quash the notice of inquiry. Citing *Mungovan v. Clare County Council* [2017] IECA 321 and *O'Donnell v. Dun Laoghaire Corporation* [1991] ILRM 301 he found that the principles of judicial review applied to proceedings which were judicial review in nature and that the strictures applicable to judicial review proceedings as to time and grounds could not be avoided by adding a claim for damages. To permit the introduction of further grounds of challenge, he said, would run contrary to the requirement articulated by Baker J. in *Casey v. Minister for Housing* [2021] IESC 42, that there should be finality at the earliest opportunity.

44. The judge proceeded to hear the action over the remainder of the week and judgment was reserved.

The substantive judgment of the High Court

45. On 24th September, 2021 Twomey J. delivered a written judgment. For the reasons given, the action was dismissed. The judgment was clear and concise.

46. Twomey J. identified four main claims: first, the claim that the inquiry was *res judicata* by reason of the previous acquittal; second, the claim that the decision of the High Court in *A.A. (No. 1)* was wrong; third, the claim that the Medical Council had usurped the powers of a court, contrary to Articles 34 and 37 of the Constitution; and fourthly, the claim that Part 8 of the Medical Practitioners Act, 2007 and/or the practice adopted by the Medical Council amounted to a breach of the equality provisions in Article 40.1 on the basis that they amounted to invidious discrimination of a professional person in contrast to how a non-professional person is treated.

47. Twomey J. found that, on the facts, there was no overlap between the criminal charges on which Dr. Van Eeden had been acquitted and the allegations the subject of the disciplinary inquiry. He went on to say that even if the subject matter of the criminal charges and the disciplinary inquiry had been the same, the difference in treatment between Dr. Van Eeden – as a doctor – and a person who was not a doctor was justified in the public interest.

48. The judge dealt shortly with the claim for a declaration that *A.A. (No. 1)* had been wrongly decided. In view of the finding of fact that the matters which had been dealt with in the District Court and the allegations the subject of the inquiry were not the same, any challenge to the correctness of *A.A. (No. 1)* was moot. In any event, he said, the claim made in the plenary proceedings for a declaration that *A.A. (No. 1)* was wrong was the same claim that Dr. Van Eeden had sought to advance in his judicial review proceedings and which had been rejected by the High Court (Faherty J.) and by this court on appeal as not even reaching the threshold of arguability.

49. The High Court judge identified the substance of the action as a challenge to the decision of the Chief Executive Officer of the Medical Council to issue the notice of inquiry. Having referred to the judgment of the Court of Appeal in *Browne v. Minister for Agriculture*

[2020] IECA 186 and of the Supreme Court in *Shell E & P Ireland v. McGrath* [2013] 1 I.R. 247, he said that no matter how the plaintiff's proceedings were viewed, the essential nature of the subject matter was to do with administrative decisions/exercise of discretion by a public authority, and that the proceedings were judicial review in nature.

50. The judge found that the argument that the Medical Practitioners Act, 2007 and/or the manner in which it was operated by the Medical Council usurped the powers of the courts – like the claim in relation to *A.A. (No. 1)* – flew in the face of established case law, in particular *M. v. Medical Council* [1984] I.R. 485, *K. v. An Bord Altranais* [1990] 2 I.R. 396 and *Akpekpe v. Medical Council* [2014] 3 I.R. 420. The established jurisprudence, he said, had, if anything, been reinforced by the majority judgment of O'Donnell J. (as he then was) in *Zalewski v. Adjudication Officer* [2021] IESC 24 (since reported at [2021] 1 I.R. 421), in which, at para.123, O'Donnell J. said:-

> *"First, if it is correct that the adjudication officer and/or the Labour Court is engaged in the administration of justice when making decisions pursuant to the procedures of the 2015 Act in relation to questions of unfair dismissal and payment of wages (and I agree that it is), then, as already discussed, I doubt that the elaborate machinery of the 2015 Act could be rendered a non-judicial administrative function merely by providing for an appeal to a court. Those cases in which recourse to a court has been found to have the effect of rescuing an adjudicatory function from unconstitutionality involve an application to court for a determination or confirmation of a determination with the full capacity of the court to come to its own conclusion on the merits so that, indeed, the court could be said to be the 'effective decision-making tribunal' and making the 'vital decisions' in a real sense, as explained by Finlay C.J. in K. v. An Bord Altranais [1990] 2 I.R. 396 at p. 403."*

51. Starting at para. 49, Twomey J. addressed the main argument advanced on behalf of Dr. Van Eeden that the invocation of the disciplinary procedure against him amounted to invidious discrimination. The argument was that a so-called non-professional person (for example – as had been suggested by counsel – a delivery man, a waiter, or a tradesman) who was acquitted of procuring unauthorised medicinal products would be free to return to his job without any inquiries, restrictions or threat of suspension or loss of licence but that he, Dr. Van Eeden, was subject to disciplinary proceedings which meant that he was at risk of sanction, including the risk that he might not be free to return to his occupation. The judge concluded that the difference in treatment between Dr. Van Eeden and, say, a delivery man was not unjust, unreasonable or arbitrary. The application of different and higher standards to some professions – he said – was not only permitted but demanded in the public interest.

52. Having addressed the four main issues, Twomey J. briefly addressed the issue of abuse of process. He found that all of the claims made in these proceedings could have been made in the judicial review proceedings. He rejected an argument that the decision of the Committee on 31st March, 2017 to adjourn the inquiry to allow him to make the judicial review application which he made soon after meant that Dr. Van Eeden was implicitly or explicitly restricted confined to the question – as to whether *A.A (No. 1).* was no longer good law – which had been canvassed before the Committee. However, while the judge (at para. 76) concluded that the plenary proceedings should be struck out as amounting to an abuse of process, he had previously in his judgment considered all the claims on the merits and the order of the High Court shows that the reliefs sought in the plenary summons were refused.

53. Finally, the judge addressed the question of what he referred to as the HPRA material. He noted that in the plenary summons Dr. Van Eeden had sought a declaration that the Medical Council had unlawfully failed to conduct its own investigation. This, he said, had not been pursued in the written or oral submissions on behalf of Dr. Van Eeden but he noted

that in response to an observation by counsel for the Medical Council that it did not appear to be pursued, counsel for Dr. Van Eeden had claimed that it was being pursued. The judge disposed of this by saying that the basis for this claim – like all of the other claims – was known to Dr. Van Eeden in September, 2016 and could and should have been but was not raised at the time he commenced his judicial review proceedings.

The notice of appeal

54. By notice of appeal filed on 23rd November, 2021 Dr. Van Eeden appealed against the judgment of Twomey J. delivered on 24th September, 2021 and the order perfected on 26th October, 2021.

55. Under the heading *"Grounds of appeal"* were twenty-one numbered paragraphs of close type running to nine pages. The notice of appeal was eventually replaced on 10th February, 2022 but I cannot leave it unsaid that the objection of the State respondents in their original respondents' notice that the notice of appeal as filed was replete with pleas which lacked clarity and were vague, general, imprecise, prolix, repetitive, scandalous and irrelevant was abundantly justified. To this I would add that the highly personalised criticism of the trial judge's valiant efforts to control the case was impertinent and baseless. If the author, in one sense, is beyond reproach Dr. Van Eeden's solicitor is to be rebuked for having filed it.

56. It is no great compliment of the amended notice of appeal to say that it was an improvement on the original. Its only saving grace is that the 35 grounds of appeal (and numerous sub-grounds) are set out under eight headings.

57. The orders sought by the amended notice of appeal include, variously, the remittal of the case to the High Court and orders in the terms of the reliefs sought by the summons.

58. However, the amended notice of appeal also sought:-

"7. … an order … permitting the appellant to also include … a challenge to the constitutionality of Part 8 AND/OR Part 9 of the Medical Practitioners Act, 2007 on the basis of Article 38 of the Constitution";

9. A declaration that the High Court in conducting its confirmatory or appellate hearing/function from the decision of the Medical Council/its Fitness to Practice Committee – as provided for by sections 74 to 76 of the Medical Practitioners Act, 2007 – in respect of criminal matters or matters/allegations which constitute criminal offences, contravenes Article 38 of the Constitution and the exercise of any such powers thereunder is an unlawful and unconstitutional exercise of power"; and

10. A declaration that the exercise by the Medical Council/its Fitness to Practice Committee and/or the High Court – pursuant to the said Parts 8 and 9 of the Medical Practitioners Act, 2007 – of the respective powers conferred thereunder in respect to hearing and determining criminal matters or matters which constitute criminal offences, is repugnant to Article 38 of the Constitution and ultra vires its/their power(s)."

59. The draftsmanship is hopelessly confused and contradictory as to the existence and exercise of powers, but I will content myself by saying that whatever this is all about, it was not the case made in the High Court.

60. Further, the amended notice of appeal proposed that this court should make:-

"8. Orders enabling the variation of any of the grounds pleaded in this notice of appeal and/or reliefs pleaded in the plenary summons herein as the court sees fit and to such a degree as may be necessary to enable the issues in the case to be correctly adjudicated on."

61. This conveys to me an acknowledgement that neither the plenary summons nor the notice of appeal discloses what the issues are. What appears to be contemplated is that the court should allow Dr. Van Eeden, at the end of his appeal, to say what his case was and what reliefs he wanted but may or may not have asked for: which is a plainly impermissible attempt to put the cart before the horse.

62. By his amended notice of appeal Dr. Van Eeden – to borrow an expression from Ms. Barrington S.C. – sought permission to conjure a Hydra. Ms. Barrington's submission was that he had already done so.

Fair procedures and access to the courts

63. The amended notice of appeal, at para. 31 of the grounds of appeal, sets out a list of eight complaints as to the *"comments and conduct"* of the High Court judge which are said to *"impugn the impartiality of the court"* in the conduct of the hearing and Dr. Van Eeden's ability to obtain a fair and sufficient hearing.

64. I will come to the appeal against the substance of the judge's reasoning and conclusions but it seems to me that this is a matter which needs to be dealt with first.

65. Six of the eight complaints are directed to observations or findings made in the judgment on the substance of the claims and obviously go to the correctness of the judgment and not the conduct of the trial. The correctness of the judge's findings – that Dr. Van Eeden's arguments *"flew in the face of established case law"*; that the proceedings constituted an abuse of process; that the judge mischaracterised and minimised Dr. Van Eeden's case and that he wrongly distinguished the authorities relied on by Dr. Van Eeden; and that the judge wrongly refused to allow Dr. Van Eeden to advance his Article 38 arguments – are all separately the subject of the appeal.

66. Two of the complaints – that the judge said that Dr. Van Eeden had knowingly decided to withhold or not to pursue substantial legal points in a deliberate bid to thwart the ability of the Medical Council to prosecute him, and that the judge struck out all of Dr. Van Eeden's claims as an abuse of process – are plainly wrong.

67. As I have said, and as I will return to, the judge found first, that the claims made in the plenary proceedings were claims that could and should have been made in the judicial review proceedings and secondly, that no reason or excuse had been offered as to why the claims (or such of the claims as had not previously been made) had not been made earlier. He did not find that the additional claims had been knowingly withheld.

68. Nor, as I have said, did the judge strike out the claims as an abuse of process. Rather, he considered the arguments made on the substance of those claims and refused the reliefs sought.

69. One of the complaints is that the judge curtailed the hearing and impermissibly limited counsel in his oral presentation of the case. However, there is no indication of what more counsel had to say which he had not said or was not dealt with in the written legal submissions. Repeatedly, throughout the conduct of the proceedings and the appeal, counsel has emphasised the importance of the case but the importance of the case is no yardstick of the time necessary for a fair hearing or an effective and focused presentation of the arguments.

70. In the course of his oral presentation of the appeal, Mr. Toal recalled that I, as the chancery list judge, refused an application – by reason of the importance of the case – to extend the permitted wordcount for Dr. Van Eeden's written submissions and that I did so because Mr. Toal was not able to say what the permitted wordcount was. That application betrayed a lack of understanding of, and engagement with, the rules and practices of the High

Court which are directed to the orderly and efficient conduct of litigation. Court time is a precious and limited resource. Elsewhere in the amended notice of appeal it is said that the High Court judge erroneously and impermissibly interfered with the appellant's running of the case by refusing to allow counsel to make the arguments he wished to make by reference to Article 38 just because he had refused to permit the amendment sought to allow those arguments to be made. This gives further insight into the challenges faced by the judge in trying to keep some order on the conduct of the trial and the management of court time. The object of pleadings is to define the issues and the object of the trial is to hear the issues so defined. It would have made no sense for the judge to have heard arguments in relation to something which was not pleaded. If, for the sake of argument, it were to be assumed that the judge erred in failing to allow the amendment, it was perfectly fair and proper that he should have insisted that the trial be conducted in accordance with his ruling.

71. Litigants (or counsel) are not entitled to dictate what court time should be allocated to a case. The list judges will engage with the parties as to the length of time that should properly be afforded for the trial. If, as sometimes happens, the estimate is short of what is in fact required, the trial judge will allow further time. But in the first instance it is the responsibility of the parties to prepare thoroughly and marshal their evidence and arguments with a view to the efficient use of the time allotted. What the complaint as to the curtailment of the hearing boils down to is that the judge confined counsel to the issues pleaded and managed the trial with a view to completing the hearing within the time allocated. That is a proper and necessary role of the trial judge in every case.

72. Finally, the impartiality of the High Court judge is said to have been tainted by the fact that he failed to disclose that he is married to a member of the medical profession. This was never explained but despite the encouragement of the court at the oral hearing of the appeal, it was not abandoned. The challenge to the impartiality of the High Court judge is

unworthy and the formulation of it is legal nonsense. It was never suggested, whether in the High Court or in the amended notice of appeal – nor could it sensibly be suggested – that the judge should have recused himself from hearing the case because his wife is a doctor. Absent any suggestion that it was relevant, it is simply not sensible to have expected that the judge might have disclosed it, *a fortiori* to seek to impugn his impartiality because he did not.

73. I am satisfied that there is nothing whatsoever to the complaints of an absence of fair procedures or access to the courts.

The amendment application

74. The first ground of appeal in the amended notice of appeal – in eleven sub-grounds and half a dozen sub-sub grounds – contends that the judge erred in taking into account matters he not ought to have, in failing to take into account matters which he ought to have, and in giving disproportionate weight to certain matters and insufficient or no weight to relevant matters.

75. Again, the contentions are confusing and inconsistent. On the one hand it is suggested that the Medical Council did not have the statutory power to act as it had, and on the other that the court has a duty to ensure that Dr. Van Eeden's constitutional rights were *"not breached by the State in its legislation or exercise of power or assumed power."*

76. It is said that the judge erred in failing to sufficiently weigh or consider the fact that the defendants were aware of the Article 38 arguments for nineteen days prior to the date of the application to amend; failed to consider whether the prejudice could be cured by an adjournment or by allowing the defendants an additional half day to respond; by failing to consider or attach weight to the defendants' submission that should the application be allowed, they would need to file supplemental submissions at the end of the hearing; by failing to recognise that if the amendment was refused the issue would *"remain live in the*

parallel 'live' prosecution by [the Medical Council] of [Dr. Van Eeden]"; and in placing no emphasis on what was said to be the fact *"that Article 38 was already engaged in the case in terms of its link to Article 37 and the res judicata/criminal charge point."*

77. It is suggested that the approach of the High Court *"appeared to be fixated on matters not directly linked to the application before the court, such as: the length of time from when the 'notice of inquiry' first issued; the ramifications for regulatory regimes were the amendment to be permitted; the applicant's prior judicial review and having delayed the [Medical Council] from holding a substantive hearing."*

78. It was suggested that the judge erred in placing irrelevant and/or disproportionate emphasis on the fact that Dr. Van Eeden could instead have brought *"his overall proceedings to challenge the constitutionality of the legislation … at an earlier remove."*

79. Article 38.1 of the Constitution – in case anyone is doubting their recollection – provides that:-

> *"No person shall be tried on any criminal charge save in due course of law."*

80. I will come in due course to the appeal against the conclusion of the High Court on what were referred to as the Article 34 and Article 37 arguments but the case – to the extent that it was evident from the pleadings – was that the Fitness to Practice Committee was engaged in the administration of justice and that the functions and powers conferred on the Committee were not limited.

81. It was submitted that the proposed amendment sought to address *"the mere omission of two words 'Article 38'".* I cannot agree. The substance of the action was a challenge to the entitlement of the Medical Council to have commenced or to pursue disciplinary proceedings on the ground that the issues raised were *res judicata.* If it was to be inferred from the fact that Dr. Van Eeden claimed that he was being *"prosecuted for the self-same*

offences" that his case was that the Fitness to Practice Committee proposed to try him for a criminal offence, his objection was not to the validity of the procedure or the availability of that procedure generally but to the invocation of the procedure in circumstances in which – he said – he had already been tried and acquitted. The basis of the Articles 34 and 37 claim was that the Oireachtas had permitted the Fitness to Practice Committee *"to usurp the powers of the court"* and that the role of the High Court on a confirmation application was *"but a rubber-stamping exercise."*

82. At first glance – and, it seems to me, on balance – the proposed amendment appeared to be a challenge to the practices of the Medical Council, rather than to the validity having regard to the provisions of the Constitution of the legislation. If – as was apprehended by counsel for the State it might have been – the intention behind the amendment was to mount a challenge to the validity of the legislation as it applied to every registered medical practitioner accused of professional misconduct which might also have been the basis for a criminal charge, that would have been a completely new case.

83. On the hearing of the appeal it was acknowledged by counsel for Dr. Van Eeden that the arguments he wished to make by reference to Article 38 were – as in the High Court counsel for the State had apprehended that they might be – substantial and far reaching and – more or less, if not unequivocally – that to have permitted the amendments would have precipitated an adjournment of the trial.

84. As he had in the High Court, Mr. Toal read out most of the judgment of Simons J. in *Stafford v. Rice (Amendment of pleadings)*. In answer to a question from the court, counsel acknowledged – and it was no great concession – that the amendment application had come long after it might have been made and on the eve of a trial date which had been fixed after months of case management; and the High Court judge had been correct in his finding that no

explanation or excuse had been offered as to why the application came to be made so late in the day. The familiar explanation offered to this court was that the Article 38 point had not previously occurred. It makes no sense to me to contemplate that a reader of the pleadings could have discerned a claim that was not in the mind of the writer.

85. The hearing of the appeal was interrupted by the indisposition and later untimely death of Mr. Toal.

86. On the resumption of the hearing, Ms. Bernice McKeever B.L., for Dr. Van Eeden, developed the argument in relation to the amendment application. Citing para. 23(5) of the judgment of Collins J. (with whom McCarthy and Ní Raifeartaigh JJ. agreed) in *Stafford v. Rice* [2022] IECA 47 – in which Collins J. cited *Croke v. Waterford Crystal* [2005] 2 I.R. 383, *O'Leary v. Minister for Transport* [2000] IESC 16 [2001] 1 I.L.R.M. 132 and *Moore v. Governor of Wheatfield Prison* [2015] IESC 21 – it was submitted that a party opposing an amendment application must be able to point to prejudice from the outside consequences of allowing the amendment, as opposed to the effect of the amendment on the case. Such prejudice, it was submitted, might be substantive prejudice – such as the death of a witness or the loss of evidence – or logistical prejudice – such as would significantly disrupt the management and determination of the proceedings.

87. Reference was made also to two cases dealing with what was acknowledged to be the stricter test applied to applications for amendment in judicial review proceedings – *Keegan v. Garda Síochána Ombudsman Commission* [2012] IESC 29 [2012] 2 I.R. 570 and *Vonkova v. Criminal Injuries Compensation Tribunal* [2019] IEHC 13 – in support of the proposition that an applicant should not without good reason be deprived of the right to argue a very significant point of law.

88. *Keegan* and *Vonkova* – which were not relied on in the High Court in support of the amendment application – are immediately distinguishable on a number of grounds. In the first place it was candidly admitted in both cases – and there was evidence – that the failure to plead earlier the point the subject of the proposed amendment was the oversight of counsel. Secondly, the amendment applications in both cases were made at a relatively early stage in the proceedings. Thirdly, the amendments sought in *Keegan* and *Vonkova* were additional grounds for the reliefs already sought and did not seek to introduce any change to the relief sought. Fourthly, in each case the amendment was allowed on the basis that it would not give rise to any significant prejudice. Fifthly, and by no means least importantly, the proposed additional grounds were clear.

89. In this case, the object of the proposed amendment was to allow an argument to be made that – irrespective of any previous criminal proceedings – the disciplinary inquiry was a criminal matter, and that it constituted the administration of justice. Although described as a new *"ground"*, the amendment proposed – if it was to be read as a challenge to the validity of any disciplinary inquiry into any allegations which might have constituted a criminal offence – was an additional relief. Ms. McKeever gamely argued that this was a case that had already been *"implicitly, albeit not explicitly"* pleaded, and that the challenge already mounted by the plenary summons was, although not explicitly, a root and branch challenge to the Act. Acknowledging that the proposed amendment *"perhaps wasn't as clear as it perhaps should be,"* counsel submitted that it was *"asserting that the powers asserted to exist by the Medical Council per the legislation are unconstitutional and in breach of Article 38."* Much was sought to be made of the fact that the defendants had not sought an adjournment and the fact that any prejudice might have been dealt with by an order as to costs or some other mitigating factor or measure.

90. Ms. McKeever, in fairness, was more forthcoming than her colleague had been as to the object of the litigation. She fairly accepted that the claim and argument the subject of the proposed amendment were available to Dr. Van Eeden from the time of service of the notice of inquiry on 22nd September, 2016.

91. By clear contrast with *Vonkova* – which was a challenge to the compatibility of the Criminal Injuries Compensation Scheme with the European Convention of 24th November, 1983; the State's obligations under Council Directive 2004/80/EC; and the State's obligations under the European Convention on Human Rights, to which the applicant wished to add a ground that it was incompatible with her right to an effective remedy, guaranteed by Article 47 of the Charter on Fundamental Rights of the European Union and/or in breach of the principle of effectiveness of European Union law in failing to provide for a guarantee of fair and appropriate compensation to the victims of violent international crimes committed in the State, as required by Article 12 of Directive 2004/80/EC, and the principle of effectiveness of European Union law – and with *Keegan* – which was a challenge to a decision of the Garda Síochána Ombudsman Commission to initiate an investigation under s. 102(4) of the Garda Síochána Act, 2005, to which the applicant wished to add a ground that the respondent had no jurisdiction under s. 88 of the Act of 2005 to have done so – the several woolly and tangled declarations sought in the general indorsement of claim in this case did not amount to a direct challenge to Part 8 of the Medical Practitioners Act, 2007 but only to *"the manner of its application to doctors against whom criminal complaints have been alleged, prosecuted but defeated."*

92. Similarly, on its face, the proposed amendment did not seek to mount a direct challenge to Part 8 but only to *"the practices engaged in"* by the Medical Council. As had been argued by the defendants in opposition to the motion to amend, the only amendment sought was the introduction of a further relief: without any amendment of the statement of

claim to set out the factual or legal basis for that relief. The proposed amendment was, at best, calculated to add to the confusion.

93. It seems to me that the proposition that the reason why Dr. Van Eeden did not previously seek to rely on Article 38 was that the point had not occurred to him or to his lawyers is inconsistent with the argument made and persisted in that the challenge on this ground was *"implicit"* in the case which was pleaded. The fact is that there was no evidence of this.

94. I give little weight to the fact that Dr. Van Eeden's written submissions filed three weeks before the trial date flagged an intention to make arguments that were not open on the pleadings, or to his insistence thereafter that he was entitled to do so, or to his insistence that the defendants would not be in the slightest prejudiced by what is now more or less acknowledged would have been – and whether acknowledged or not, would have been – an entirely new case.

95. I give considerable weight to the fact that the new arguments on which reliance would have been placed – that Part 8 of the Act of 2007 in its entirety should be condemned as invalid having regard to the provisions of Article 38 the Constitution – would have been at variance with the proposed new ground which explicitly referred to (without attempting to identify them) the practices of the Fitness to Practice Committee.

96. It is the fact that if whatever it was Dr. Van Eeden wanted to say about Article 38 had been pleaded earlier, the defendants could have answered that case. It is the fact that if the amendment had been allowed, the defendants could have been given the opportunity to address it. But, as counsels' submissions to the High Court on the amendment application show, the first objection would have been that the defendants could not know what the new case was.

97. It seems now to be accepted – and if I am wrong in that, it is the fact – that the defendants would have been prejudiced if the proposed amendment had been allowed. I must say that I was exercised to some extent by the submission in the High Court by counsel for the defendants that if the amendment were permitted they would need to file additional submissions but this was clearly a fall-back position in circumstances where the thrust of their argument was that the amendment should not be permitted, not least because it was far from clear what the proposed new case was.

98. It is accepted that from the time of service of the notice of inquiry Dr. Van Eeden was in possession of all the facts and was from then in a position to plead whatever case he wished to make. Even on the basis that the timing of the amendment application were to be measured by reference to the date of issue of the plenary summons, it came after months of case management directed to getting the case to trial and on the very eve of the scheduled trial date. It is not in controversy that save for good reason, the defendants were entitled to have known at the time of delivery of the statement of claim of the case they were required to meet. If the judge did not say so in terms, it follows that a defendant will necessarily be prejudiced by the attempted introduction at the very last minute of a new case, and *a fortiori* of a new case which is not clear. Moreover, it would have been quite unsatisfactory for the High Court to have embarked upon a constitutional challenge to the validity of an Act of the Oireachtas which had not been clearly formulated and of which the defendants plainly had not had sufficient notice.

99. If the High Court judge, in what was an *ex tempore* judgment on the amendment application, did not get into the fine detail, the prejudice which the defendants would have been exposed to was by no means limited to half a day of court time or the opportunity to file additional written submissions. According to the amended notice of appeal, the judge erred in failing to consider whether the prejudice to the defendants could be cured by an

adjournment or an order for costs but, as Ms. Barrington pointed out, nobody proposed that there would be an adjournment or an order for costs. It was certainly not for the defendants to suggest how the prejudice might be cured.

100. In any event, the judge clearly identified that the Medical Council had already been prejudiced by the delay and – echoing the observations of Hardiman J. in *A.A. v. Medical Council (No. 2)* [2003] 4 I.R. 302 – said that it was in the interests of Dr. Van Eeden, the public interest, and the interest of the Medical Council that the inquiry should be resolved as soon as possible. Far from curing the prejudice which arose from the late amendment application, an adjournment would have caused further delay and so would have exacerbated it.

101. I am satisfied that the refusal of the High Court judge to permit the proposed amendment was comfortably within his discretion.

Res judicata and A.A. (No. 1)

102. The amended notice of appeal groups together the grounds of appeal in relation to *"Res judicata and A.A. (No. 1)"*

103. This misses the point (first made by counsel for the Chief Executive Officer, then by the legal assessor to the Committee, then by Faherty J., then by the Court of Appeal in dismissing the appeal against the refusal of leave, and most recently by Twomey J.) that any legal argument as to whether the Committee could or should inquire into the allegations the subject of the inquiry on the basis that they were the same as those on which the criminal charges were based depended on an assessment in the first place as whether, in fact, the subject matter of the inquiry and the criminal charges was the same.

104. It is now said that the judge erred in finding that there was no overlap between the charges on which Dr. Van Eeden was acquitted and the matters the subject of the disciplinary proceedings but there is no attempt to identify what the alleged overlap is.

105. If it could be said that the ingredients of the first allegation – that Dr. Van Eeden had in February, 2012 imported a quantity of Lidocaine without a manufacturer's authorisation, contrary to regulation 4(c) of the Medicinal Products (Control of Manufacture) Regulations, 2007 – were the ingredients of a criminal offence, that was not an offence of which he had been acquitted.

106. The alleged administration of the unauthorised medicines was no part of the criminal charges and – as with the alleged importation of the unauthorised medicine – the charge was of professional misconduct.

107. It is now said that the allegations the subject of the inquiry *"flow directly from the prosecution file used in the District Court prosecution"* and that *"the material from the District Court prosecution and acquittal grounded the subsequent prosecution by [the Medical Council/Fitness to Practice Committee]."* Leaving aside the fact that this was not pleaded, it does not go to the question of *res judicata*.

108. The doctrine of *res judicata* prohibits the reopening of an issue which has already been decided between the parties concerned by a competent court or tribunal. In this case – as in *A.A. (No. 1)* – there is no identity of the parties in the criminal process and the inquiry before the Fitness to Practice Committee. More fundamentally – if only for present purposes – the issues determined by the District Court are not the same as the issues the subject of the inquiry. The issue before the District Court was whether Samuel Van Eeden, as a person, had, on 12th June, 2012, procured or imported eight identified unauthorised medicinal products. The issues before the Fitness to Practice Committee are whether in February, 2012, Dr. Van

Eeden, a registered medical practitioner, imported and administered an unauthorised medicinal product (incidentally not one of the medicinal products the subject of the criminal charges); whether in June, 2012 he intended to administer unauthorised medicinal products to a patient or patients in his professional care; and whether he knowingly or recklessly gave a false answer to a question on his Annual Retention Form.

109. Leaving aside for the sake of argument that it was no part of the case pleaded, it does appear to be the fact that the disciplinary allegations against Dr. Van Eeden are based in part on the evidence gathered in the course of the then Irish Medicines Board investigation into the medicines found in Mrs. Van Eeden's suitcase in Dublin airport on 12th June, 2012 and on the interviews then conducted by enforcement officers of the Board. But if all of Dr. Van Eeden's woes can be traced back to the opening of Mrs. Van Eeden's suitcase, that does not go to the identity of the issues.

110. As the High Court judge pointed out, any question as to whether *A.A. (No. 1)* was – or following *J.C.* remained – good law simply did not arise unless the issues before the District Court and the Fitness to Practice Committee were the same: which they were not.

111. Moreover, as had been pleaded and argued by the Medical Council, Dr. Van Eeden's challenge to the correctness of the decision in *A.A. (No. 1)* had already been made and determined in the judicial review proceedings.

112. I am quite satisfied that the analysis and conclusion of the High Court was correct.

Invidious discrimination.

113. The first of the five grounds of appeal under this heading is that the High Court judge:-

"… erred in finding that where a matter is the subject of a (District Court) acquittal that the acquittal in the case of a non-professional means more than the acquittal when one is a professional. That in essence an acquittal can be re-opened – outside of a Court – depending on the nature of one's employment."

114. That is simply not what the judge found.

115. The second ground under this heading boldly asserts that the High Court judge erred *"in failing to recognise the case advanced it appears … that no criminal matters or trial of criminal offences can be heard/decided outside of a court …"* This was the argument which depended on the amendment to introduce Article 38. It does not appear that the judge failed to recognise anything. The judge did not address that argument or proposition because it was not part of the case pleaded.

116. The third ground under this heading is that the judge erred in his conclusion that a difference in treatment of Dr. Van Eeden, as a doctor, and a person who is not a doctor, is not merely justified but required by the public interest. This, it is said, fails to respect the universality of the status of an acquittal and admits of discrimination as against one acquitted person versus another. Apart from being entirely circular, the argument is based on the manifestly false premise that the foundation of the disciplinary inquiry is the same as the criminal charges. The fourth ground is more or less a restatement of the third.

117. Lastly, it is said the judge *"erred in his consideration and assessment of the law on invidious discrimination despite the weight of case law put forward by Dr. Van Eeden before the Court for its consideration and as evidence in the trial judge's scant consideration and analysis of same in his 15 page written judgment."* Just as the importance of a case is no measure of the time necessary to properly present it, neither is the length of the argument or volume of the case law relied on any measure of the length of the judgment needed to deal

with it. The weight of case law is not to be measured on an avoirdupois basis. It is not necessary or useful that a judgment should deal with, or even reference, authorities to which reference may have been made but which are not relevant to the issues to be decided.

118. As Mr. Douglas Clarke S.C., for the State respondents, put it in argument, what Article 40.1 requires is that like persons should be treated alike and different persons treated differently by reference to the manner in which they are distinct.

119. The members of a regulated profession are treated differently to persons who are not members of a regulated profession, and members of each regulated profession are treated differently to members of any other regulated profession. They are treated differently because they are different.

Article 34 and 37 of the Constitution

120. As I have said earlier, the statement of claim described the Medical Council as a statutory body *"with delegations made to it under and in accordance with Article 37 of the Constitution to regulate and oversee, including, from time to time, matters of a disciplinary nature."* I have added the emphasis. To my mind, this portrays the Medical Council as a statutory body exercising limited functions and powers of a judicial nature.

121. There was no further reference in the body of the statement of claim to Article 37 and none at all to Article 34 of the Constitution but there was a claim, at para. 13 of the prayer, for:-

> *"A declaration that the legislature, by framing the 2007 Act in the manner as executed has wrongfully and unlawfully and unconstitutionally extended the parameters provided for in Article 37 of the Constitution, whereby bodies such as the defendant may, by delegation, behave in such a manner comparable to that of a court properly so called save that the delegation provided for extend beyond that*

reasonably permissible whether in law or under the Constitution. The powers delegated by the Medical Practitioners Act 2007 to the defendants is ultra-vires the legislature as a consequence whereof the powers of sanction provided for under Part 9 of the 2007 Act when forwarded to the High Court for affirmation is but a rubber-stamping exercise, the defendant having been wrongfully and constitutionally [sic.] permitted to usurp the powers of the court in such matters."

122. This was distilled or translated by the High Court judge into intelligible English as a claim for a declaration that the Act of 2007 and/or the manner in which it is operated by the Medical Council contravenes Articles 34 and 37 of the Constitution, insofar as proceedings before the Fitness to Practice Committee amounted to the administration of justice which was not limited in nature. This, said the judge, flew in the face of existing and well settled case law: and he referred to *M. v. Medical Council* [1984] I.R. 485, *Akpekpe v. Medical Council* [2013] IEHC 38 [2014] 3 I.R. 420. *K. v. An Bord Altranais* [1990] 2 I.R. 396, and *Zalewski v. Adjudication Officer* [2021] IESC 24 [2021] 1 I.R. 421. He concluded that, if anything, *Zalewski* confirmed the established jurisprudence.

123. I am bound to say that I found it very difficult to follow and understand the grounds of appeal under this heading or the argument made on behalf of Dr. Van Eeden. The contention is that the High Court erred in not considering whether the impugned parts of the Act of 2007 involved the administration of justice and, if it did, whether the power conferred on the Fitness to Practice Committee went beyond limited functions and powers, and instead simply decided that the Committee was not engaged in the administration of justice. In one breath, it is said that the judge did not consider the argument – which he plainly did – and in the next, that he failed to re-evaluate *M. v. Medical Council* and *Akpekpe* in the light of *Zalewski* – which he also plainly did. It is said that the cases referred to by the judge *"are not the same as to the factual matrix"* but it is not said what the difference is supposed to be.

124. As I understand the argument, it is that the judge failed to consider – and to find – that the fact that a decision to impose a sanction of advice, admonishment or censure under s. 71(1)(a) was not required to be confirmed by the High Court meant that such a decision amounted to the administration of justice and that, in consequence, *"the entire part complained of fell foul of the Constitution in light of Zalewski or otherwise."* It was also contended that the decisions of the Fitness to Practice Committee were *"purported convictions of the Medical Council in respect of alleged criminal offences and criminal matters."*

125. Mr. Clarke, in his oral submissions, identified three propositions which, he said, could be distilled from the established authorities and which, he submitted, were dispositive of all of Dr. Van Eeden's constitutional complaints.

126. Mr. Clarke's first proposition was that the Supreme Court in *Zalewski* confirmed – as was explained by Finlay C.J. in *K. v. An Bord Altranais* – that the requirement in the Act of 2007 for a court application for confirmation of a decision of the Fitness to Practice Committee with the full capacity of the High Court to come to its own conclusion on the merits meant that the court was the effective decision making tribunal. The second was that since the Fitness to Practice Committee was not engaged in the administration of justice; it was not necessary to look at the saver provisions of Article 37. It was submitted that it was clear that the Medical Council process did not entail the trial of a person on a criminal charge so that the Article 38 complaint – even if it had been pleaded – was without substance. The third proposition was that the Article 40.1 complaint was rooted in the twin fallacies that the fitness to practice inquiry was a second criminal prosecution and that Article 40.1 precluded the treatment or regulation of medical practitioners differently from the general population or workforce. What Article 40.1 requires, it was submitted, is that like persons should be

treated alike and different persons treated differently by reference to the manner in which they are distinct.

127. To understand – or as Mr. Clarke submitted, to expose – the argument made by reference to Articles 34 and 37, it is necessary to examine the statutory scheme.

128. Section 71 of the Act of 2007 sets out a list of the sanctions available to the Medical Council in the event that an allegation against the medical practitioner is found to have been proved. The first of these – in s. 71(1)(a) – at the lowest end of the scale, is an advice or admonishment, or a censure, in writing.

129. Section 75 of the Act of 2007, as enacted, and it is stood at the time of the commencement of these proceedings and at the time of the High Court judgment, provided for a right of appeal by the medical practitioner to the High Court against any adverse decision other than a decision to impose a s. 71(1)(a) sanction, and s. 76 provided for an application to the High Court by the Medical Council in any case that was not the subject of an appeal for confirmation of any decision to impose any sanction other than a s. 71(1)(a) sanction. By s. 74, a decision to impose a sanction other than a s. 71(1)(a) sanction does not take effect unless it is confirmed by the court.

130. By s. 128 of the Regulated Professions (Health and Social Care) (Amendment) Act, 2020, which was commenced on 14th March, 2022 by the Regulated Professions (Health and Social Care) (Amendment) Act, 2020 (Commencement of Certain Provisions) Order, 2022 (S.I. No. 115 of 2022) the Act of 2007 was amended on 14th March, 2022 to introduce a right of appeal to the High Court against a decision to advise, admonish or censure, but not to require a court application by the Medical Council in the absence of an appeal.

131. Mr. Clarke brought the court through what he said were the essentially relevant authorities starting with the judgment of Finlay P. in *In re M., a Doctor* [1984] I.R. 479, then

M. v. Medical Council [1984] I.R. 485, *C.K. v. An Bord Altranais* [1990] 2 I.R. 396, *Keady v. Commissioner of An Garda Síochána* [1992] 2 I.R. 197, and then *Zalewski*. He drew attention in particular to the finding by Finlay P. (as he then was) in *M. v. Medical Council* [1984] I.R. 485 – to which Twomey J. referred – that the power of the Medical Council – at that time set out in s. 48 of the Medical Practitioners Act, 1978 – to advise, admonish or censure, even if it did involve the administration of justice, was a limited function and power of a judicial nature which was permitted by the exemption provided by Article 37.

132. It was, as Mr. Clarke observed, a striking feature of the case that the constitutional complaints on behalf of Dr. Van Eeden were agitated without engagement with – and in the main without even identifying – the text and structure of the legislative provisions challenged. The complaint that the judge failed to conduct an in-depth analysis of the Part of the Act complained of is misconceived. It was not the function of the High Court to embark upon a roving inquiry but to identify – as best could be done – and then to address the arguments advanced on behalf of the plaintiff.

133. In 1984, in *In re M., a Doctor*, Finlay P. found that the hearing of an application by a medical practitioner under what was then s. 46 of the Medical Practitioners Act, 1978 for an order cancelling a decision of the Medical Council that his name be erased from the register constituted an entire trial of the issues involved and was not a mere appeal.

134. Later that year, in *M. v. The Medical Council*, Finlay P. held that the exercise by the Committee and the Council of the powers conferred by the Act of 1978, apart from the power to publish and the power to advise, admonish or censure, did not constitute the administration of justice and that the powers to publish or to advise, admonish or censure, even if they did involve the administration of justice, were limited functions and powers of a judicial nature, which were permitted by the exemption in Article 37.

135. In 1988, in *Keady v. Commissioner of An Garda Síochána*, a unanimous full Supreme Court held that Articles 37 and 38 of the Constitution did not operate to prohibit a statutory or other domestic tribunal inquiry into allegations which might also found a criminal prosecution.

136. In 1990, in *K. v. An Bord Altranais* the Supreme Court applied *In re M., a Doctor* and *M. v. The Medical Council* to the materially identical procedure established in respect of nurses by the Nurses Act, 1985, finding that the essence of the statutory procedure was that it was the High Court which made the effective decision leading to an erasure or suspension.

137. And in 2021, in *Zalewski*, in the passage cited by the judge, and in the sentence emphasised by the judge, the majority of the Supreme Court found that:-

> *"Those cases in which recourse to a court has been found to have the effect of rescuing an adjudicatory function from unconstitutionality involve an application to court for a determination or confirmation of a determination with the full capacity of the court to come to its own conclusion on the merits so that, indeed, the court could be said to be the 'effective decision-making tribunal' and making the 'vital decisions' in a real sense, as explained by Finlay C.J. in K. v. An Bord Altranais [1990] 2 I.R. 396 at p. 403."*

138. It was suggested in the amended notice of appeal that the High Court judge erred in approaching the matter on the consideration solely of the more serious sanctions provided for by the Act of 2007 without addressing the question of the sanctions pursuant to section 71(1)(a). That is simply not so. The judge, at para. 42, expressly referred to the principles applied by the Supreme Court in *M. v. The Medical Council* in determining whether the power vested in the Medical Council by the Act of 1978 to impose minor sanctions and

serious sanctions (if confirmed by the High Court) did not amount to an administration of justice, also applied to disciplinary proceedings under the Act of 2007.

139. While it was asserted that Dr. Van Eeden's case was different, counsel could not identify what the alleged difference or differences was or were. If it was – or was supposed to be – that Dr. Van Eeden had been acquitted on the criminal charges, this was immaterial to the nature of the powers conferred by the Act of 2007.

140. If the judge did not *"engage in a specific consideration as to whether the impugned parts of the legislation involved the administration of justice per Article 34 and then, whether, if it did, did it permit only the exercise of limited powers and functions in matters other than criminal matters as per Article 37"*, he did not need to; nor would it have been appropriate for him to have done so. The questions which Dr. Van Eeden sought to canvas were long ago answered by settled and binding authority.

141. Incidentally, the exclusion in s. 75 of the Act of 2007 as it previously stood of the right of appeal against a decision to impose a s. 71(1)(a) sanction; in s. 74 of the requirement for confirmation of a decision before it would become effective; and in s. 76 of the requirement for a court application for confirmation of a decision which was not appealed, was in each case expressed as *"(not being a decision referred to in section 71(1)(a)"* so that – it seems to me – any constitutional infirmity referable to s. 71(1)(a) could have been cured by blue pencilling the exception rather than condemning the entire Part.

142. Dr. Van Eeden and/or his lawyers was or were miffed by the judge's observation that his arguments flew in the face of existing and well settled case law: but they did.

143. As there was no need for the High Court judge to have, so there is no need for this court to examine the authorities referred to as to whether tribunals other than the Fitness to Practice Committee and the Medical Council were engaged in the administration of justice.

Proceedings erroneously viewed and treated as judicial review.

144. The amended notice of appeal contends that the High Court judge erred in finding that the proceedings were judicial review proceedings and/or treating the proceedings as if they were judicial review proceedings; in characterising the proceedings as being in substance a challenge to the decision of the Chief Executive Officer to issue the notice of inquiry; and in his assessment of the nature of the proceedings *"by minimising or not sufficiently focussing … on the fact that the legislation in question was being challenged as to its being in conflict with the Constitution."*

145. In practical terms, this largely goes back to the refusal of the amendment application.

146. The first thing to be said about this is that Dr. Van Eeden did not claim a declaration that Part 8 – or any other provision – of the Act of 2007 was invalid having regard to the provisions of the Constitution. He did not present himself simply as a registered medical practitioner, or as a registered medical practitioner who was the subject of a fitness to practice inquiry, but as a registered medical practitioner who was being treated differently to citizens who were not registered medical practitioners. His argument was that as a member of a regulated profession, he was being treated differently to persons who were not members of a regulated profession, specifically because the Medical Council was seeking to hold him to account for alleged offences of which he had been acquitted.

147. Secondly, the statement of claim described the Medical Council as a body created by statute *"with delegations made to it under and in accordance with Article 37 of the Constitution to regulate and oversee, including, from time to time, matters of a disciplinary nature."* To my mind, this acknowledged the validity having regard to the provisions of the Constitution of the legislation by which the Medical Council was established, and the validity

having regard to the provisions of the Constitution of the powers conferred by the legislation as limited functions and powers of a judicial nature in matters other than criminal matters.

148. The case pleaded was that notwithstanding Dr. Van Eeden's acquittal, the Medical Council *"sought essentially to retry the plaintiff by distorting, perverting and doing violence to the English language so that the plaintiff may, with certainty be tried before them for the self-same offences for which he was acquitted and in doing so avoid the doctrine of res judicata."* This conveys to me that the complaint was that the Medical Council was doing something which it was not entitled to do under the legislation. Further and alternatively, it was pleaded that the Medical Council *"purport to pursue and prosecute the plaintiff for alleged breaches of discipline."* This again conveys to me that the complaint was that the Medical Council was doing something which it was not empowered to do.

149. It was asserted that *"… the plaintiff challenges, by this action, those complained of sections and/or parts of the aforesaid 2007 Act* [it did not identify any sections or parts of the Act] *as amounting to the creation of an unconstitutional mechanism which treats him separately, adversely and in an invidious manner to his fellow citizen"* but immediately went on to plead that *"… the Act, its provisions and component parts have historically been used in the manner complained of against such medics … such as to establish an implied entitlement/methodology to proceed by the [Medical Council] in the manner complained of."* If on one view the assertion was that the Medical Council was not empowered by the Act to do what it was doing, the thrust of the pleading, it seems to me, was not a challenge to the validity of the legislation but to the pursuit of the plaintiff in respect of charges or matters of which he had been acquitted.

150. The lynchpin of the Ms. McKeever's oral submission was that the proceedings could not properly have been classified as judicial review because:- *"… there is no actual decision,*

no decision, which is crystallised, which could be the subject of a judicial review." This, in my firm view, is demonstrably incorrect.

151. Leaving to one side for the moment the arguments relied on as to why it was so, the substance of the claim was that Dr. Van Eeden was the subject of an unlawful disciplinary inquiry. I am prepared to contemplate, for the sake of argument, that the notice of inquiry might be regarded as a purely administrative step by the Chief Executive Officer in implementing the decision of the Preliminary Proceedings Committee that there was a sufficient *prima facie* case to warrant further action and to refer the complaint to the Fitness to Practice Committee, in which case, strictly speaking, the impugned decision might have been that of the Preliminary Proceedings Committee to refer the complaint to the Fitness to Practice Committee rather than – as it was on the judge's analysis – the decision of the Chief Executive Officer to issue the notice of inquiry: but that makes no difference. Whatever the form of the proceedings and however the reliefs were formulated the objective was to stop the enquiry.

152. I am satisfied that Dr. Van Eeden's reliance on *North East Pylon Pressure Campaign Limited v. An Bord Pleanála* [2016] IEHC 300 and *Mongovan v. Clare County Council* [2020] IESC 17 is misplaced. The decision or administrative act to which Dr. Van Eeden objects is the establishment of the inquiry. The injustice which he asserts is that he is being wrongfully and unlawfully held to account by the Fitness to Practice Committee. If that is so, the only effective remedy would be to halt the inquiry. It seems to me that the validity or lawfulness of the inquiry is quintessentially a matter for judicial review.

153. In *North East Pylons* Humphreys J. said at para. 117:-

> *"Do grounds 'first arise' when they first enter the narrative in any way, or when the applicant could possibly have raised them, or do they arise in the sense in which that*

term is used in O. 84, r. 21, in general, only when the applicant is substantively damnified by becoming the recipient of an adverse decision? The general rule would seem to have been acknowledged that time runs from the date of the final decision."

154. On any view, Dr. Van Eeden's case is that he has been damnified by being wrongfully held to account by the Fitness to Practice Committee. That arose, at the latest, on the service on him of the notice of inquiry dated 22nd September, 2016. The relevant *"final"* decision was the convening of the inquiry and not whatever decision might emerge after the inquiry.

155. It was submitted on behalf of Dr. Van Eeden that the judgment of this court (Collins J., Costello and Pilkington JJ. concurring) in *Kennedy v. Director of Public Prosecutions* [2020] IECA 360 is all fours with the instant case. It is relied on as authority for the sweeping proposition that an earlier judicial review is no bar to a later constitutional challenge by plenary summons.

156. Mr. Kennedy was stopped by a Garda while driving and required to provide a preliminary breath specimen, which he did not. He was arrested and brought to a Garda station. He was charged with failing failure to provide a specimen of breath at the roadside – contrary to s. 12(3) of the Road Traffic Act, 1961 – and with a separate offence of failing to provide a specimen of breath at a Garda station – contrary to section 13(2). He was convicted in the District Court of both offences.

157. In the course of his appeal to the Circuit Court, Mr. Kennedy sought and obtained disclosure of a document relevant to the s. 13(2) prosecution but the Circuit Court judge permitted the redaction of the document. Mr. Kennedy then brought judicial review proceedings to challenge the decision to direct disclosure in redacted form. The judgment

does not disclose how he got on. Mr. Kennedy was ultimately convicted by the Circuit Court of the s. 12(3) offence but acquitted on the s. 13(2) charge.

158. In the meantime, after his conviction in the District Court and while his appeal to the Circuit Court was pending, Mr. Kennedy issued a plenary summons challenging the constitutionality of s. 12(3) of the Road Traffic Act, 1961. He claimed that he had a constitutional right to a defence based on an inability or incapacity but that this was not available to him under the impugned provision, and that therefore s. 12(3) was inconsistent with the Constitution. The factual basis of his defence was that because of a hearing impairment he could not hear the instructions of the Garda at the roadside and therefore could not understand what he needed to do in order to provide the breath specimen required of him.

159. The defendants to the plenary action moved quickly – specifically before the District Court appeal had been heard –to have it struck out as being an abuse of process and as failing to disclose any cause of action *"in circumstances where the Circuit Court has yet to make any findings of fact such as could properly ground a defence of inability/incapacity."*

160. By the time the defendants' motion to strike out came on for hearing in the High Court, Mr. Kennedy's District Court appeal had been heard and determined. His appeal against the s. 13(2) conviction was allowed but his conviction on the s. 12(3) charge was affirmed. The Circuit Court judge found that Mr. Kennedy's hearing was not impaired to the extent that – presumably, when stopped by the Garda and presented with a clear plastic bag with a tube at one end – he did not understand what he was required of him. Thereafter, there was no factual basis for his claim of unconstitutionality. The Court of Appeal affirmed the order of the High Court striking out Mr. Kennedy's action on the ground that he had no plausible basis for contending that he had a defence to the s. 12(3) charge.

161. Collins J. then turned to the alleged abuse of process: which was that Mr. Kennedy should have mounted any constitutional challenge at the same time as his judicial review application. He said that there was no basis on which it could plausibly be said that the plenary action was oppressive of the State or otherwise constituted an abuse of process and he identified eight relevant factors, not least the defendants' argument that the constitutional challenge was premature because the criminal proceedings had not – at the time of commencement of the plenary action – concluded.

162. Collins J. observed that the parties to the plenary proceedings were not the same as the parties to the earlier judicial review proceedings; that the only issue in the judicial review proceedings was a discrete and narrow one concerning the disclosure/redaction in the context of the s. 13 prosecution; that there was an obvious imperative to have the issue raised in the judicial review proceedings determined before the District Court appeal was heard; that it was by no means clear that if the s. 12(3) claims had been included in the judicial review proceedings they should or would have been determined before the criminal proceedings were concluded; and that the defendants had not identified any material prejudice.

163. In this case the High Court judge was content to distinguish *Kennedy* on the single ground that one of the factors in the decision of the Court of Appeal was – and it was – that the failure to bring the constitutional challenge in the earlier proceedings had not materially prejudiced the defendants. By contrast, he said, the Medical Council had been clearly prejudiced because the inquiry, which had already been delayed by adjournment applications and the judicial review proceedings, was being delayed further by what he described as the unconstitutionality claims.

164. I agree with the High Court judge that *Kennedy* is distinguishable on the ground identified by him. No less, the judicial review application in *Kennedy* was directed to a narrow and discrete issue in a pending District Court appeal and not to the substantive appeal.

165. In this case, the reliefs sought by Dr. Van Eeden in his judicial review proceedings, as well as the grounds, were extremely woolly but the thrust if it was that the Fitness to Practice Committee could not proceed with the inquiry because the allegations were *res judicata.* If there were constitutional arguments in the mix, the action did not unambiguously challenge the validity of the Act of 2007 having regard to the provisions of the Constitution. Unlike *Kennedy*, all of the issues which Dr. Van Eeden sought to raise in his 2021 plenary action were ripe at the time of the notice of inquiry in 2016. Unlike *Kennedy*¸ defendants in this case were able to identify a clear prejudice.

166. Moreover, Dr. Van Eeden seeks to advance in these proceedings the same claims as were previously advanced and rejected in the judicial review proceedings. If – leaving aside the fact that they were previously made and rejected – the *A.A. (No. 1)* and *res judicata* claims could properly have been made as part of the plenary proceedings, it is difficult to see how the other claims made in the plenary proceedings could not have been made at the time of, if not as part of, the judicial review application.

167. In any event, with the possible exception of the claims in relation to the HRPA material, to which I will come, it is clear that the judge dealt with all of the claims on the merits.

168. The proposition that the assessment of the claims made in the plenary proceedings has *"far reaching consequences as regards Dr. Van Eeden's capacity to challenge any subsequent engagement he may have with the Medical Council in any respect"* is nonsense.

Abuse of process

169. There is considerable overlap in the grounds of appeal and arguments relied upon in relation to the assessment of the High Court judge as to the nature of the action and his findings in relation to abuse of process. The recurring theme is that the action was a constitutional challenge to Part 8 of the Act of 2007.

170. It is incontestable as a proposition of law that a litigant is not entitled to seek to litigate again an issue which had been finally determined. It is incontestable as a matter of fact that issues which Dr. Van Eeden sought to raise in this action as to the correctness of the decision in *A.A. (No. 1)* and as to whether the inquiry into allegations against him was *res judicata* had been raised and determined against him in his judicial review proceedings.

171. The first ground of appeal under this heading is that the High Court judge erred in failing to deal with the issue of abuse of process as a preliminary objection but instead wrapped it up as an element of the substantive hearing. There is no merit to this. To deal with the question of abuse of process it was necessary to set out the factual background and to examine the claims made in the plenary proceedings and the claims previously made in the judicial review proceedings. It is not suggested that the judge erred in identifying the four issues which he identified as the main issues as the main issues. While the defendants persisted in their objection to the proceedings, they also addressed all of the claims on the merits and did not press the judge to dismiss the action as an abuse of process. Unless the argument it that the judge should not have addressed the substance of his claims but should simply have dismissed his action as an abuse of process, the order in which he dealt with the issues is irrelevant.

172. It is said that the judge erred in failing to give any consideration to the fact – said to have been clearly articulated in his pleadings – that the constitutional points were not apparent or known to him until shortly before the institution of the plenary proceedings.

That, too, is completely irrelevant. The foundation of the defendants' arguments and of the judge's conclusions was that all of the issues sought to be raised in the plenary proceedings could and should have been raised at the time he instituted his judicial review proceedings. The principle is that a party should not be vexed twice in the same matter. It is no answer to a complaint of abuse of process to say that the point did not occur earlier.

173. Twomey J., at para. 62, found that all of the claims which Dr. Van Eeden advanced in the plenary proceedings were available to him in September, 2016 when he received the notice of inquiry. That is not in contest.

174. At para. 64, the judge identified the strongest reason advanced for the failure to make the claims at that time as the agreement counsel claimed to have made with the Medical Council at the Fitness to Practice Committee meeting on 31st March, 2017 that the inquiry would be adjourned to allow him to bring judicial review proceedings to challenge the inquiry on the sole ground that *A.A. (No. 1)* was no longer good law. I suppose that strength is relative but for my own part I have difficulty understanding how it could have been a reason at all. Simply put, I cannot see how Dr. Van Eeden could possibly have been constrained – or could have perceived himself as having been constrained – from advancing an argument that had not occurred to him. If that is so, it seems to me that the entire argument as to the basis on which the inquiry was adjourned is a red herring.

175. The submission that there was agreement at the hearing on 31st March, 2017 that the then proposed judicial review application would be confined to the *"novel"* argument that what was said by the Supreme Court in *J.C.* undermined the correctness of *A.A. (No. 1)* was not only not borne out but was contradicted by the transcript. Far from agreeing to an adjournment to facilitate the proposed High Court application, counsel for the Chief Executive Officer opposed it. Similarly, the suggestion that Dr. Van Eeden was bound by an

undertaking given by counsel to the Committee is not borne out by the transcript of the hearing. Counsel for Dr. Van Eeden then requested an adjournment to allow a judicial review application to be brought on the basis of his *A.A. (No. 1)/J.C.* argument. There was no hint that he might have had any other point to make. By then, he had had six months' notice of the inquiry and of evidence which the Chief Executive Officer proposed to adduce but had nothing to say about that. According to the statement of claim (and elsewhere in the arguments made in support of the appeal) the invidious discrimination did not occur to him or his lawyers until substantially upwards of four years later.

176. The proposition that what are referred to as the constitutional arguments could not have been made in the judicial review proceedings because the Attorney General was not a party goes nowhere. While it is contended that Dr. Van Eeden and his lawyers did not think of the constitutional arguments before the judicial review proceedings were finally disposed of, it is not suggested that those arguments would not have been open to him: if anyone had thought of them.

HPRA material

177. As to the fact that the claim in relation to the HPRA file was not argued, it was submitted on the appeal that the plenary summons took precedence over the submissions and that in response to the submission on behalf of the Medical Council that it did not appear that the claim was being pursued counsel for Dr. Van Eeden had *"trenchantly made it clear that in no way, shape or form had the issue … fallen away."* It is more or less acknowledged that there was no argument as to why it was said the declarations in relation to the HPRA file ought to be granted.

178. Counsel contended that the claim had been made abundantly clear in the statement of claim, which was said to run to 27 pages (which it did) but did not identify precisely where in the statement of claim the claim was made.

179. The short answer to this argument is that statement by counsel that a claim is being maintained – or a denial by counsel, however trenchant, that a claim was not being pursued – is no substitute for the requirement that a plaintiff establish the factual and legal basis on which a claim is said to be grounded.

180. That apart, it is far from clear from the statement of claim what was being said about the HPRA material.

181. The statement of claim, at para. 2, having pleaded Dr. Van Eeden's acquittal on the criminal charges, went on to assert that:-

> *"However, the HPRA, after the acquittal had been achieved and, in unlawful consort [sic.] with the [Medical Council], wrongfully and unlawfully thereafter handed their investigation file to the servants and/or agents of the [Medical Council] who have, since that time, sought to essentially re-try [Dr. Van Eeden] by distorting, perverting and by doing violence to the English language so that [Dr. Van Eeden] may, with certainty be tried before them for the self-same offences for which he was acquitted and in doing so avoid the doctrine of res judicata and the finality of an acquittal as recognised by statute."*

182. There is a bald assertion that the HPRA investigation file was unlawfully handed over but there is no indication as to why that was alleged to have been unlawful. The substance of the complaint appears to me to be that Dr. Van Eeden was being tried again for the offences of which he had been acquitted and – I suppose – that the allegations in the notice of inquiry were the same as the criminal charges.

183. Later, at para. 9, there is a plea that notwithstanding its expressed interest, the Medical Council did not have anyone in attendance at the District Court on the hearing date to take a watching brief and/or a note: but there is no plea that the Medical Council was obliged to have had someone in attendance to take a note.

184. The only subsequent reference to the HPRA file is in para. 6 of the prayer, where there is a claim for:-

> *"... a declaration that the handing over of the investigation file carried out by the HPRA which grounded its prosecution of the plaintiff before the District Court from which the acquittals flowed, to the [Medical Council] is not such as to obviate or make lawful the obligations imposed on the [Medical Council] under Part 7 [of the Medical Practitioners Act, 2007] to undertake its own investigations and witness scrutiny prior to the initiation of the Part 8 process."*

185. Notably, there is no claim for a declaration that the handing over of the HPRA file was unlawful, or even that the Medical Council was not entitled to use it. Nor was there any claim that the requirements of Part 7 were not complied with before the complaint was referred by the Preliminary Proceedings Committee to the Fitness to Practice Committee.

186. According to the notice of appeal, Dr. Van Eeden maintains his claim that the HPRA material is inadmissible and cannot constitute evidence against him or otherwise be used by the Medical Council or the Fitness to Practice Committee: but that is not a claim which was pleaded or argued. The amended notice of appeal portends a further court application if the question as to the admissibility of the HRPA material is not resolved in the present proceedings but the declarations claimed were addressed to the conduct of the inquiry and not the admissibility of whatever evidence might be offered to the inquiry.

187. The judge, at para. 80, found that the basis for any claim by reference to the HPRA material was known to Dr. Van Eeden in September, 2016: which it clearly was. This finding, and his finding that it was not open to Dr. Van Eeden to make the point in the plenary proceedings which could and should have been raised at the time of the judicial review proceedings was prefaced by the words *"in any event"*. The primary basis of the judge's conclusion on this point was that whatever had been pleaded had not been pursued at the trial. That is not contested.

Conclusion

188. For all of these reasons I would dismiss the appeal on all grounds and affirm the order of the High Court.

189. The respondents having succeeded on all grounds, I can think of no reason why they might not be entitled to an order for their costs but I would allow Dr. Van Eeden fourteen days from the date of electronic delivery of this judgment to file and serve a short written submission – not exceeding 1,000 words – as to what other order might be made, and why. In that event, I would allow the respondents fourteen days to file and serve a replying submission – similarly so limited. In the event that Dr. Van Eeden makes no such submission orders will be made that the respondents' costs of the appeal be paid by Dr. Van Eeden, such costs to be adjudicated by a legal costs adjudicator in default of agreement. At the risk of stating the obvious, the costs of any argument in relation to the costs of the appeal will follow the event of the outcome of any such issue.

190. As this judgment is being delivered electronically, Haughton and Binchy JJ. have authorised me to say that they agree with it, and with the orders proposed.